CLIENT ALERTS & INSIGHTS

Browning-Ferris Valid for Joint Employer Analysis Once Again

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Just over two months after the National Labor Relations Board ("NLRB") reversed the *Browning-Ferris* decision that re-wrote the test the NLRB used for joint employment (see our December 15 alert here), the Board vacated its decision in *Hy-Brand Industrial Contractors* and reinstated *Browning-Ferris.*

In 2015, the NLRB established a joint employer test in *Browning-Ferris* that held that mere potential control over the working conditions of another employer's employees was sufficient to find a joint employer relationship. In December 2017, the NLRB, with the recent addition of Board member William Emanuel, overturned *Browning-Ferris* in *Hy-Brand*. In *Hy-Brand*, the Board found that finding joint employer status required (1) that a putative joint employer exercised joint control, rather than merely having reserved the right to exercise control; (2) that the control is direct and immediate rather than indirect; and (3) that joint-employer status will not result from "limited and routine" control.

However, on February 9, NLRB Inspector General ("IG") David Berry sent a report to Board members stating that Emanuel should not have participated in the *Hy-Brand* decision because his former law firm represented Leadpoint in the 2015 decision and the *Hy-Brand* case was essentially a direct continuation of *Browning-Ferris*. The IG stated that the deliberations in *Hy-Brand* involved the legal rights of the parties in *Browning-Ferris* meaning "for all intents and purposes … the vehicle to continue the deliberations of Browning-Ferris."

On February 26, the Board unanimously vacated the *Hy-Brand* decision in light of the IG report, meaning that the *Browning-Ferris* joint-employer test is once again in place. The Board stated that its designated agency ethics official determined that Emanuel should have been disqualified from the proceeding, prompting the decision to vacate.

For more information on this topic, contact a member of Benesch's Labor & Employment Practice Group.

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